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No. 95-1065

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

REVEREND PAUL SCHENCK AND DWIGHT SAUNDERS,
Petitioners,

v.

PRO-CHOICE NETWORK OF WESTERN NEW YORK, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE CITY OF PHOENIX, ARIZONA, AS AMICUS CURIAE SUPPORTING RESPONDENTS

DAVID A. STRAUSS
Special Assistant City Attorney
1111 East 60th Street
Chicago, IL 60637
(312) 702-9601

RODERICK G. MCDOUGALL *
City Attorney

MARVIN A. SONDAG
Assistant City Attorney
200 West Washington Street
Phoenix, AZ 85003
(602) 262-4557

* *Counsel of Record*

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QUESTION PRESENTED

Amicus will address the following question:

Whether the First Amendment is violated by an injunction that requires petitioners to move fifteen feet away from any person seeking access to a health services facility who specifically indicates a desire that petitioners move away.

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BRIEF FOR THE CITY OF PHOENIX, ARIZONA, AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE AMICUS CURIAE

An ordinance of the City of Phoenix, Section 23-10.1 of the Phoenix City Code, makes it unlawful for any person "in the course of demonstration activity" within 100 feet of a health care facility to "fail to withdraw upon a clearly communicated request to do so to a distance of at least eight (8) feet away from any person who has made the request." The constitutionality of Section 23-10.1 was upheld by the United States Court of Appeals for the Ninth Circuit in *Sabelko v. City of Phoenix*, 68 F.3d 1169 (1995). A petition for a writ of certiorari seeking to review the Ninth Circuit's judgment in that case was filed on March 4, 1996 (*Sabelko v. City of Phoenix*, No. 95-1415) and is pending before this Court.

Petitioners both here and in No. 95-1415 assert that Section 23-10.1 is similar to Paragraph 1(c) of the injunction at issue in this case. See 95-1415 Pet. 10; 95-1065 Pet. Br. 36 & n.21. The continued pendency of the certiorari petition in No. 95-1415 suggests that the Court may dispose of that petition in light of its decision in this case. Because the ultimate decision on the constitutionality of the City's ordinance may, therefore, be affected by the decision in this case, the City of Phoenix has a direct and immediate interest in this case.

STATEMENT

Petitioners are two individuals who, together with numerous other individuals and various organizations, were sued by respondents in the United States District Court for the Western District of New York. Respondents asserted that petitioners and their co-defendants were members of a conspiracy that sought, through illegal means, to obstruct access to various health care facilities that provide abortions. Pet. App. A-5 to A-6. After extensive proceedings, the district court issued a preliminary injunction that forbade petitioners and the other defendants from, among other things, "demonstrating within fifteen feet" of "any person or vehicle seeking access to" a health services facility in the Western District of New York at which abortions are performed. Pet. App. A-34.

Paragraph 1(c) of the injunction further provided, however, that "sidewalk counseling consisting of a conversation of a non-threatening nature by not more than two people with each person or group of persons they are seeking to counsel shall not be prohibited." Pet. App. A-34 to A-35. But paragraph 1(c), as subsequently modified, went on to provide that any persons engaged in such "sidewalk counseling" were to "cease and desist from such counseling," and adhere to the fifteen foot restriction, whenever "the targeted person or group 'indicates, either verbally or non-verbally, that they do not wish to be counseled' " (*id.* at A-35, A-29; citation omitted).

Petitioners challenged the injunction, including paragraph 1(c), on a variety of grounds. In the decision below, the United States Court of Appeals for the Second Circuit, sitting en banc, rejected petitioners' claim that paragraph 1(c) violates the First Amendment. See Pet. App. A-16 to A-17. Two opinions each were joined by a majority of the judges on the en banc court of appeals.

The opinion of the court, written by Judge Oakes, began by outlining the facts, found by the district court, that formed the basis for the injunction. Paragraph 1(c) was concerned with a practice that petitioners and their co-defendants called "sidewalk counseling," which consists of "[d]emonstrators[']approach[ing] patients entering the clinics, offer[ing] them anti-abortion literature, and try-[ing] to convince them not to have an abortion." Pet. App. A-10. But while petitioners "contend[] that this sidewalk counseling is done in a peaceful manner," in fact "the demonstrators often become angry and frustrated when patients persist in entering the clinic." *Ibid.* The court of appeals, quoting the district court's findings, then described the conduct of the defendants in this case (*id.* at A-10 to A-11; citation omitted):

> The "counselors" then turn to harassing, badgering, intimidating and yelling at the patients * * * in order to dissuade them from entering. They continue to do so even after the patients signal their desire to be left alone. The "sidewalk counselors" often crowd around patients, invade their personal space and raise their voices to a loud and disturbing level.

"Many of the sidewalk counselors," the court of appeals noted, "have been arrested on more than one occasion for harassment, yet persist in harassing and intimidating patients, patient escorts, and medical staff." *Id.* at A-11. The court of appeals also noted extensive evidence about the harmful medical effects of the practices in which petitioners and their co-defendants engaged. *Ibid.*

On the basis of this record, the court of appeals concluded that the restriction contained in paragraph 1(c)

"burden[s] [no] more speech than necessary to accomplish its goal" and is therefore constitutional under this Court's decision in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994). Pet. App. A-33 (brackets in original; internal quotation marks omitted); see 114 S. Ct. at 2525. The court noted that paragraph 1(c) allows petitioners, or any two "sidewalk counselors," to approach "their target audience face-to-face * * * without being invited." Pet. App. A-28. The "counselors," the court of appeals further noted, "need not retreat unless expressly rejected by a counselee, and then only to a distance of fifteen feet." *Ibid.* The court stated that the purpose of paragraph 1(c) was to "provide a vulnerable group of medical patients with some relief from the duress caused by unwelcome physical proximity to an extremely vocal group of demonstrators." Pet. App. A-30. The court concluded that "[t]his purpose is content-neutral, as it is the demonstrators' physical proximity which is regulated rather than their message." *Ibid.* The court of appeals also upheld the district court's conclusion that, without a provision like paragraph 1(c), "women seeking access to the clinics [would be] 'captive' to [petitioners'] invasive conduct and unable to 'walk away' " (Pet. App. A-31; citation omitted).

Judge Winter's concurring opinion, also joined by a majority of the court, embraced what it described as the "somewhat broader principle" that "the First Amendment does not, in any context, protect coercive or obstructionist conduct that intimidates or physically prevents individuals from going about ordinary affairs." Pet. App. A-37. Specifically, Judge Winter stated, "there is no right to invade the personal space of individuals going about lawful business, to dog their footsteps or chase them down a street, to scream or gesticulate in their faces, or to do anything else that cannot be fairly described as an attempt at peaceful persuasion." *Id.* at A-42.

Judge Winter acknowledged that "the legal breathing space afforded the protestor in defining coercion or obstruction may vary according to the forum and ability of the audience to avoid the protest at little cost." Pet. App. A-43. In this case, however, Judge Winter stated, there was "a considerable amount of obstruction and bullying by both the protestors and the self-described counselors." *Ibid.* Specifically, Judge Winter noted, "some of the counselors in the instant matter have in the past resorted to bullying as soon as their proffer of advice was rebuffed" (*id.* at A-45). Judge Winter reasoned that "[a] nose-to-nose confrontation is hardly essential to a conveying of the protestors' views and will, given their history of intimidation, be reasonably perceived by those seeking to enter the clinic as intimidating." *Id.* at A-44. He accordingly concluded that there is "no First Amendment barrier to a requirement that, once the would-be counselors have had an opportunity to offer advice and it is declined, they must respect the buffer area applicable to protestors." *Id.* at A-45.

Judges Meskill and Altimari dissented. They stated, among other things, that "[a]s long as the injunction ensures access to the clinics," and "patients approaching the clinics * * * can escape the unwanted message simply by continuing to walk towards and entering the clinic." Pet. App. A-64. Further, the dissenters said, "[w]hile counselors may cause distress to those attempting to enter the clinics, such offense is an inevitable cost of free expression under the First Amendment." *Id.* at A-65.

SUMMARY OF ARGUMENT

I. Although this case concerns the constitutionality of an injunction, the Court's decision is likely to influence litigation over city ordinances and other legislation that has some similarities to the injunction at issue here. The Court may, therefore, wish to reaffirm the principle that general legislative measures are subject to a less stringent standard of review than injunctions. Because legislative measures apply to a broad class of people, instead of just

a limited group of named individuals, there is a built-in political check against the possibility that legislation will restrict speech unduly. An individual who wishes to challenge a legislative measure can take advantage of a variety of procedural protections that are not available to a person who challenges an injunction. And the inherent differences between the legislative and judicial processes—courts must act on the basis of an adjudicative record, whereas legislatures can, and indeed should, draw on a broader range of sources of information—make it appropriate to allow a legislature more leeway in justifying its actions.

II. The concept underlying paragraph 1(c) of the injunction at issue here—that a speaker may approach an individual entering a health care facility but must move a short distance away from any individual who so requests—is fully consistent with the First Amendment.

A. 1. Paragraph 1(c), and measures like it, impose only a narrow and limited restriction on individuals who wish to engage in expressive activities. Petitioners are free to speak, jeer, and wave placards even at individuals entering a health care clinic, so long as they stay fifteen feet away. Moreover, petitioners, or any other pair of demonstrators, are free to approach such individuals and speak to them face to face. The only limitation paragraph 1(c) imposes is that if those individuals specifically object, petitioners must move back a few paces before resuming their expressive activity.

This modest limitation on petitioners' conduct protects interests of the first magnitude. The Court has repeatedly ruled that the First Amendment does not give anyone a right to force unwelcome speech on an individual who objects. This principle applies even to unwanted mail. *A fortiori*, it should apply to highly instrusive conduct like that in which petitioners seek to engage.

2. Petitioners suggest that an individual's interest in not being subjected to such conduct vanishes once an

individual leaves the home. This Court's decisions do not support such an implausible rule. On the contrary, the Court's decisions dealing with the regulation of speech in public places have emphasized that speakers are allowed a greater latitude in such places precisely because unwilling listeners can, if they wish, simply avert their eyes, walk away, or otherwise minimize their exposure to the speech that they find objectionable or intrusive.

Measures like paragraph 1(c) are designed precisely to ensure that unwilling listeners will be able to exercise this prerogative to avert their eyes and walk away—in this case, unwilling listeners who are not random members of the public but who are entering a health care facility and are therefore particularly vulnerable.

B. A measure like paragraph 1(c) does not constitute an impermissible "audience veto" of speech. The notion of an "audience veto" or a "heckler's veto" is that the hostility of some members of an audience should not be a justification for restricting a speaker's ability to speak to *other* members of the audience, or members of a broader audience. It does not mean that a speaker has a right to continue to force speech on the very individual who has indicated a desire not to be subjected to it. In any event, paragraph 1(c) does not compel petitioners to stop speaking to anyone: it only requires them to move a short distance away from a specific individual who specifically objects. There is no "veto" of any speech—only of physically confrontational tactics.

C. The decision below is fully consistent with the portion of *Madsen* that invalidated a restriction on approaching persons entering a clinic who did not "indicate[] a desire to communicate." The *Madsen* restriction was both more broad and more vague. Perhaps most important, the *Madsen* restriction placed the burden on the speaker to obtain consent to approach a person; paragraph 1(c) allows petitioners to speak to anyone unless and until that

person specifically objects. That distinction is crucial under the Court's decisions.

D. Measures like paragraph 1(c) therefore present no special concerns under the First Amendment. The only remaining question is whether paragraph 1(c) itself is an appropriate remedy in this case. In view of the history of intimidation and harassment revealed by the record, the district court's decision to impose this remedy, upheld by the court of appeals, was plainly warranted.

ARGUMENT

I. THE COURT SHOULD CONTINUE TO APPLY A LESS RESTRICTIVE STANDARD TO GENERAL LEGISLATION LIMITING THE TIME, PLACE, AND MANNER OF DEMONSTRATIONS THAN IT APPLIES TO INJUNCTIONS AIMED AT SPECIFIC INDIVIDUALS.

This case concerns the constitutionality of an injunction that applies only to petitioners and certain other named individuals and groups. Some of the provisions found in the injunction, however, including the restriction in paragraph 1(c), are comparable in certain respects to restrictions found in legislative enactments. For example, as we have said, Section 23-10.1 of the City Code of the City of Phoenix makes it unlawful for a demonstrator near a health care facility to refuse to move eight feet away from any individual who makes "a clearly communicated request" that the demonstrator withdraw.[1]

[1] The Phoenix ordinance (which is set forth at 95-1415 Pet. App. 56a-58a) applies to the "access area" of a health care facility, which is defined as any portion of a public street "or other public place or any place open to the public" that is "within one hundred (100) feet of an exterior wall or entryway of a health care facility." § 23-10.1(B)(1). "Demonstration activity," as defined by the ordinance, "includes but is not limited to protesting, picketing, distributing literature, attempting to impede access, or engaging in oral protest, education, or counseling activities." § 23-10.1(B)(2). The ordinance also defines "[h]ealth care facility" and specifies how to measure the eight-foot distance. § 23-10.1(B)(3) and (C).

Other jurisdictions have adopted somewhat similar measures. See, *e.g.*, Santa Barbara [CA] municipal Code ch. 9.99 (quoted in *Edwards v. City of Santa Barbara*, 883 F. Supp. 1379, 1394-95 (C. D. Cal.), vacated, 70 F.3d 1277 (9th Cir. 1995)); Colo. Rev. Stat. § 18-9-122, upheld in *Hill v. City of Lakewood*, 911 P. 2d 670 (Colo. Ct. App. 1995), petition for cert. filed, No. 95-1905 (May 24, 1996).

These legislative measures differ in significant respects both from each other and from paragraph 1(c) of the injunction at issue here. But the Court's decision on the constitutionality of paragraph 1(c) may influence litigation over legislative measures of this kind. For this reason, the Court may wish to reaffirm a central feature of its holding in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994)—that in reviewing injunctions like the one at issue here, the Court will engage in "a somewhat more stringent application of general First Amendment principles" than it does when it reviews generally applicable legislation. *Id.* at 2524. In other words, legislative measures containing restrictions comparable to paragraph 1(c) are to be judged by a more lenient standard than the Court will apply to paragraph 1(c) in this case.

Under *Madsen*, a general legislative enactment is judged according to the established standard "set forth in *Ward v. Rock Against Racism*, [491 U.S. 781 (1989)], and similar cases." 114 S. Ct. at 2524. That standard, as the Court said, is whether a measure is "narrowly tailored to serve a significant governmental interest." *Ibid.*, quoting *Ward*, 491 U.S. at 791, and citing *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). See also *Frisby v. Schultz*, 487 U.S. 474, 481 (1988). In the case of an injunction, by contrast, the courts must pay more "close attention to the fit between the objectives of [the] injunction and the restrictions it imposes on speech." *Madsen*, 114 S. Ct. at 2525. The question

becomes "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Ibid.*

The Court in *Madsen* gave several reasons for using different standards. Perhaps most important, legislation, unlike an injunction, applies not to specific, identified persons, but to a wide range of individuals. This feature of legislation itself is a safeguard against threats to First Amendment interests. See 114 S. Ct. at 2524. The City of Phoenix's ordinance, for example, applies to all demonstrators at health care facilities. It applies no matter what the demonstrators' views are about abortion; it also applies to individuals who are demonstrating not about abortion but about the use of animals for medical experimentation, a physician's political activities, a labor dispute, the availability of alternative medicine, or any other subject. If a city council or state legislature, acting on such a broad-gauge basis, were to consider a measure that unduly limited speech, the many affected groups and individuals would be able to mobilize to defeat the measure in the legislative process. Thus general legislation comes with a built-in political check that helps ensure that the measure will not be too restrictive of free expression.

In addition, while an injunction is a means of resolving a dispute between particular parties, "[o]rdinances represent a legislative choice regarding the promotion of * * * societal interests." *Madsen,* 114 S. Ct. at 2524. That is, the range of social interests at stake when a city council or a state legislatiure acts is usually broader than the interests affected by an injunctive remedy afforded in a lawsuit between private parties. The legislative choice, reflecting as it does the judgment of elected representatives about the public interests at stake, is entitled to a high degree of deference.

In fact, the difference in the treatment of legislative and judicial restrictions on expression has roots that go

deeper than the decision in *Madsen.* While the Court in *Madsen* held that injunctions like the one at issue here are not "prior restraints" within the meaning of such cases as *New York Times Co. v. United States,* 403 U.S. 713 (1971), and *Vance v. Universal Amusement Co.,* 445 U.S. 308 (1980), see 114 S. Ct. at 2524 n.2, many of the reasons for the historical concern with prior restraints have to do with the differences between legislative measures and court orders.

For example, an individual has the option of violating a statute or ordinance and then defending a subsequent prosecution on the ground that the measure is unconstitutional. That option is ordinarily unavailable when a person wishes to challenge the constitutionality of an injunction. See, *e.g., GTE Sylvania, Inc. v. Consumers Union,* 445 U.S. 375, 386-87 (1980); *Walker v. City of* Birmingham, 388 U.S. 307 (1967). In some circumstances at least, private parties may initiate civil contempt proceedings against persons who violate an injunction; by contrast, the enforcement of a statute or ordinance rests with public officials. That provides an extra check on excessive interference with expression. Moreover, a person charged with violating a legislative enactment is ordinarily entitled to a trial by jury—historically an especially important right in the protection of freedom of expression. See Leonard W. Levy, Emergence of a Free Press 37-44 (1985) (describing jury nullification in trial of John Peter Zenger). Civil contempt proceedings can be tried without a jury. For all of these reasons as well, it is appropriate to apply a less restrictive standard to legislative enactments.

Perhaps the most basic reason to apply different standards to legislative enactments and judicial decrees, however, is that the legislative and judicial processes are themselves fundamentally different. The Court's holding in *Madsen* that different standards apply to legislation and injunctions rests in part on these differences, "quite apart from First Amendment considerations" (114 S. Ct. at

2525). An injunction is based on adjudicative proceedings focused on the conduct of the specific individuals named in the injunction. It is therefore reasonable for the Court to pay more "close attention to the fit between the objectives of an injunction and the restrictions it imposes on speech" (*ibid.*) and to expect an injunction to be "tailored by a trial judge to afford more precise relief than a statute" will ordinarily afford. *Id.* at 2524.

But a legislature, unlike a court, is not limited to remedying specific violations that have been proved in an adjudicative proceeding. It is not required to base its actions on findings of fact about the precise problem its legislation seeks to remedy. See, *e.g.*, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50-52 (1986). Elected representatives are entitled to draw on a wider range of sources of information, not all of which can be reduced to an evidentiary record. This is precisely the legislative body's comparative advantage—its "informed acquaintance with local conditions to which the legislation is to be applied." *Carmichael v. Southern Coal Co.*, 301 U.S. 495, 510 (1937). For these reasons, the requirement that *Madsen* imposed on court orders limiting expressive activity—a close nexus between a specific condition requiring a remedy and the specific prohibition chosen to remedy it—is simply not appropriate in the case of a city ordinance or other general legislative measure.

II. THE REQUIREMENT THAT PETITIONERS MOVE A SHORT DISTANCE AWAY FROM AN INDIVIDUAL TO WHOM THEY ARE SPEAKING, UPON A SPECIFIC REQUEST BY THAT INDIVIDUAL, DOES NOT VIOLATE THE FIRST AMENDMENT.

Judged by the standard appropriate to injunctive remedies, the requirement of paragraph 1(c) does not violate the First Amendment. Under *Madsen*, of course, the constitutionality of paragraph 1(c) depends on an assessment of the specific facts in the record. But many of the arguments advanced by petitioners and their supporting amici suggest that the concept underlying paragraph 1(c) and similar legislative measures—a requirement that demonstrators move a short distance away from an individual who asks them to do so—necessarily raises serious questions under the First Amendment. This suggestion is entirely incorrect.

A. 1. In *Rowan v. United States Post Office*, 397 U.S. 728 (1970), the Court unanimously upheld the constitutionality of a statute providing that any persons who object to mailings from a particular sender can insist that the sender remove their names from all of its mailing lists and refrain from mailing them any materials in the future. See *id.* at 732-35; 39 U.S.C. § 3008. The Court acknowledged that this statute would restrict expression to some degree: "To make the householder the exclusive and final judge of what will cross his threshold undoubtedly has the effect of impeding the flow of ideas, information, and arguments that, ideally, he should receive and consider." 397 U.S. at 736. Nonetheless, the Court held, the statute was constitutional because "[n]othing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit" (*id.* at 737.)

Rowan relied in part on *Martin v. City of Struthers*, 319 U.S. 141 (1943), where the Court, speaking through Justice Black, invalidated a municipal ordinance that forbade the door-to-door distribution of literature but explicitly ruled that "[a] city can punish those who call at a home in defiance of the previously expressed will of the occupant" (*id.* at 148). The Court explained that "[t]his or any similar regulation leaves the decision as to whether distribut[o]rs of literature may lawfully call at a home where it belongs—with the homeowner himself." *Ibid.*

The same principles control this case. Like the measures upheld in *Rowan* and approved in *Martin*, paragraph

1(c) leaves speakers free to approach, and speak to, whomever they please. Paragraph 1(c) merely ensures that an unwilling target of such expressive activity will have some way to avoid being relentlessly subjected to it. "If [such a] prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient." *Rowan*, 397 U.S. at 738. As the Court has recently reaffirmed, the government's interest in prohibiting "speech directed primarily at those who are presumptively unwilling to receive it" is not only permissible under the First Amendment; it is "substantial and justifiable." *Frisby v. Schultz*, 487 U.S. at 488.

In fact, on any plausible scale of First Amendment values, the constitutionality of paragraph 1(c) follows *a fortiori* from the principle recognized in *Rowan*. Unwanted mail is far less intrusive than speakers who position themselves literally inches from an individual and refuse to move away when asked to do so. If the government may protect the interest in being free from unwanted mail, even though such mail can be immediately discarded, then surely it may protect individuals' interest in having people who confront them on the street back off a few paces.

On the other side of the ledger, the statute upheld in *Rowan* barred a speaker from using a very important medium of communication—the postal system—to reach any addressee who objected to even one of the speaker's mailings. Such a restriction has a far more dramatic effect on speech than a measure like paragraph 1(c). Measures like paragraph 1(c) do not bar any communication from any speaker to any recipient; they simply require that the speaker not stand physically close to an individual who explicitly indicates that that is her wish.[2]

[2] In addition, unlike paragraph 1(c) and similar measures, the statute upheld in *Rowan* was, in an important respect, content-based. The *Rowan* statute provides that the Postal Service will order a sender to remove an addressee from its mailing list if the addressee "in his sole discretion believes" that a "pandering advertisement" received from that sender was "erotically arousing or sexually provocative." 39 U.S.C. § 4009(a) (1964 ed., Supp. VI), quoted at 397 U.S. at 730; see 39 U.S.C. 3008(a). While an addressee's decision to terminate mailings is not reviewed by any government official, see 397 U.S. at 739 n.6—so in practice addressees can terminate mailings for any reason they wish—the statute still requires addressees to conclude that the materials were "erotically arousing or sexually provocative." Some addressees might refuse to invoke such a statute if their objection to the material rested on other grounds.

Paragraph 1(c) does not have this content-based character. It permits individuals to rebuff petitioners and their co-defendants for any reason whatever. In this respect, too, the constitutionality of paragraph 1(c) follows *a fortiori* from *Rowan*.

2. Petitioners and some amici seek to draw a sharp distinction between speech that enters the home and speech in public places, asserting that measures like paragraph 1(c) are acceptable only to protect the heightened privacy interests present in the home. See, *e.g.*, Pet. Br. 42; AFL Am. Br. 28; Fam. Res. Coun. Am. Br. 10-13.[3] It is true, of course, that the Court has recognized the strength of the interest in protecting the home against unwanted intrusions. See, *e.g.*, *Frisby*, 487 U.S. at 484-85. But paragraph 1(c) hardly protects patients seeking access to health care facilities from all unwanted intrusions. They can be approached by any two individuals, who can continue to speak to the patients until the patients affirmatively object. Even then, a patient can be subjected to shouting, chanting, jeering, and the waving of placards by large crowds of people, all directed specifically at the patient, from as close as fifteen feet

[3] "AFL Am. Br." refers to the brief of the American Federation of Labor and Congress of Industrial Organizations as amici curiae. "Fam. Res. Coun. Am. Br." refers to the amicus curiae brief of the Family Research Council, "FL ACLU Am. Br." refers to the brief filed by the American Civil Liberties Union of Florida, et al., as amici curiae.

away. Any of these activities could obviously be banned in or even near a home. See *Frisby*, 487 U.S. at 486-87. Therefore it cannot possibly be said that respondents, in defending the constitutionality of paragraph 1(c), are trying to extend to public places the standards that should apply only to the home.

There is an even more important error in petitioners' argument, however. A principal reason that the Court has extended a broader protection to speech in public places is, as the Court has repeatedly said, that when individuals are in public places they can ordinarily avoid any speech that they find objectionable. For example, in *Erznoznick v. City of Jacksonville*, 422 U.S. 205 (1975), the Court struck down an ordinance that forbade drive-in movie theaters from showing films that displayed nudity on a screen visible from a public place. But in explaining why the ordinance "cannot be justified as a means of preventing significant intrusions on privacy," the Court noted that "the screen of a drive-in theater is not 'so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.'" *Id.* at 212 (citation omitted). The ordinance was unconstitutional, the Court stated, because it "seeks only to keep these films from being seen from * * * places where the offended viewer readily can avert his eyes." *Ibid.* Similarly, in *Cohen v. California*, 403 U.S. 15 (1971), where the Court overturned the conviction of a person who displayed a vulgar political slogan on a jacket he wore in a courthouse, the Court, in responding to the argument that the speech was being forced on an unwilling audience, stated that "[t]hose in the * * * courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Id.* at 21. See also *Spence v. Washington*, 418 U.S. 405, 412 (1974).

Cohen and *Erznoznick*, of course, invalidated measures that were, unlike paragraph 1(c), based on the content of expression. See 403 U.S. at 18; 422 U.S. at 211-12.

Even so, the Court was careful to note, as a predicate for invalidating the measures, that it was possible for viewers to minimize their exposure to the expression if they found it objectionable. In cases involving non-content-based regulation of expression, even in the most public of places, the Court has even more vigorously protected the interest in allowing people to avoid speech if they so choose.

For example, *Schneider v. State*, 308 U.S. 147 (1939), invalidated a ban on handbilling in the streets; but as the Court has recently emphasized, "[i]n *Schneider* * * * we spoke of a right to distribute literature only 'to one willing to receive it.'" *Frisby*, 474 U.S. at 485, quoting *Schneider*, 308 U.S. at 162. See also *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion); *id.* at 307-08 (Douglas, J., concurring). In *Cox v. Louisiana*, 379 U.S. 536 (1965), the Court, while invalidating the convictions of civil rights demonstrators, went out of its way to emphasize that "[a] group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations." *Id.* at 555. See also *Cameron v. Johnson*, 390 U.S. 611, 616-17 (1968). This is, in substance, exactly the "right" on which petitioners "insist" here: the right to force any individuals who wish to enter a health care facility to "listen to their exhortations" face-to-face.

Finally, in *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992), the Court upheld a ban on face-to-face solicitation in airports, citing, among other things, the difficulty that the targets of such solicitation will have in disentangling themselves from the solicitors (*id.* at 683-84) and the "risks of duress" (*id.* at 684) —among them, the risk that the solicitor "will target the most vulnerable" (*ibid.*)—as well as the danger of "'intimidati[on]'" (*id.* at 689 (O'Connor, J., concurring), citing *United States v. Kokinda*, 497 U.S. 720, 734-34 (1990) (plurality opinion); see also 505 U.S. at 705

(Kennedy, J., concurring). If solicitation can be banned in a place where there is no reason to believe that any particular target will be especially vulnerable or will find the solicitation unwelcome, then surely the conduct in which petitioners wish to engage—approaching individuals whom they know to be highly vulnerable, and who have explicitly indicated that their approach is unwelcome—can also be banned.

In fact, the dissenters in *Lee*, who would have invalidated the ban on solicitation, explained that they discounted the risk of coercion or intimidation precisely because the targets of the solicitation retained the ability to escape from the solicitor. "While a solicitor can be insistent, a pedestrian * * * can simply walk away or walk on." 505 U.S. at 713 (Souter, J., dissenting). In contrast, a target of petitioners' speech cannot "walk away" if petitioners have, as they contend, a constitutional right to remain in close proximity to her the entire time she is on public property. Whatever the merits of bans on solicitation in various contexts, this should leave no doubt about the general validity of measures like paragraph 1(c); they are designed to preserve precisely the right of the target of a speaker's aggressive behavior to "walk away" from the speaker.

B. 1. Petitioners further assert that paragraph 1(c) is invalid because it constitutes an "audience veto" (*e.g.*, Pet. Br. 38-39). This argument rests on a simple misunderstanding of the Court's decisions. The Court has ruled that the hostility of some members of a speaker's audience is generally not a reason to restrict a speaker's ability to reach *other* members of the audience, or members of a broader audience. The Court has never suggested that there is a right to persist in forcing speech on the very listeners who do not want to be subjected to it.

For example, in *Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992), the case on which petitioners principally rely, the Court invalidated an ordinance that imposed a fee on demonstrators who used public property. The Court noted that the amount of the fee depended on the extent to which the demonstrators would need protection from a hostile audience. *Id.* at 134-36 & n.12. Speakers who "wish[ed] to express views unpopular with bottle-throwers" would therefore face greater financial burdens if they wanted to reach any audience at all. *Id.* at 134.

It is in this sense that a "heckler" may not "veto" a person's speech: a heckler's opposition may not ordinarily be the reason to restrict the speaker's ability to reach others. See, *e.g.*, *Cohen*, 403 U.S. at 23; *Feiner v. New York*, 340 U.S. 315, 325-27 (1951) (Black, J., dissenting); *Terminiello v. Chicago*, 337 U.S. 1 (1949).[4] But of course paragraph 1(c) does not restrict speech in this way. Paragraph 1(c) does not have the slightest effect on petitioners' ability to reach a willing audience. In fact, paragraph 1(c) leaves petitioners free to speak to anyone they like, in any way they like, except for face-to-face confrontations with a specific individual who has specifically requested them to move away. Even then, petitioners may continue to speak to that individual from a reasonable distance. There is no "veto" of anyone's speech—only of physically confrontational tactics.

2. Similarly, petitioners and some amici cite this Court's statements to the effect that "citizens must tolerate

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[4] In fact, no case demonstrates more clearly the weakness of petitioners' contention than the seminal "hostile audience" decision, *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Cantwell, a religious proselytizer, requested permission before playing a phonograph record to passers-by on the street; when his audience was offended by the message, and told Cantwell so, Cantwell promptly stopped playing the record and moved on. *Id.* at 302-03, 308-09 (1940). The Court, in overturning Cantwell's conviction for breach of the peace, specifically noted: "we find only an effort to persuade a *willing* listener to buy a book or to contribute money" (*id.* at 310; emphasis added).

insulting, and even outrageous, speech." *Boos v. Barry*, 485 U.S. 312, 322 (1988). See, *e.g.*, AFL Am. Br. at 14; see also Pet. Br. 38; FL ACLU Am. Br. 13. The dissenters in the court of appeals asserted, in the same vein, that the emotional harm that petitioners would inflict on patients trying to enter the clinics "is an inevitable cost of free expression under the First Amendment." Pet. App. A-65. But the cases on which petitioners rely, including *Boos*, involved content-based laws in which the *government* made the determination which speech was unacceptably "insulting" or "outrageous." See, *e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *City of Houston v. Hill*, 482 U.S. 451, 459-60, 462-63 (1987); *Boos*, 485 U.S. at 318-21; *Cohen v. California*, *supra*.[6]

As the Court has repeatedly emphasized, what makes these cases troubling from the point of view of the First Amendment is precisely that it is the government—not

[6] The single case cited for this point by petitioners and their supporting amici that involved a non-content-based restriction was *Madsen*, which we discuss at pages 21-23 below.

One of the amici, somewhat oddly, places a great deal of emphasis on *City of Houston v. Hill*, *supra*. See AFL Am. Br. 15-17. We note that the facts of *Hill*, recounted at length in the amicus brief (Br. 15), not only bear little resemblance to what is at issue here but were not the basis for the Court's ruling in *Hill*; the Court expressly declined to decide "whether the ordinance has been unconstitutionally applied to Hill." 482 U.S. 458 n.6. The Court decided the case on overbreadth grounds. *Id.* at 467. (Amicus also inaccurately states that the Court overturned Hill's conviction. Br. 16. Hill was acquitted, not convicted, and brought suit to enjoin the enforcement of the ordinance. 482 U.S. at 454, 455.) In any event, the Court made it plain in that case that the fatal constitutional defect in the Houston ordinance was that it restricted speech with a certain content. See 482 U.S. at 460-62. In fact, the Court went out of its way to say that a municipality could prevent conduct comparable to the behavior that paragraph 1(c) enjoins. See, *e.g.*, 482 U.S. at 462 n.11, quoting *id.* at 479 (Powell, J., concurring in part and dissenting in part).

the individual—that is determining that the speech is unacceptably offensive. See, *e.g.*, *Boos*, 485 U.S. at 319; *City of Houston*, 482 U.S. at 466-67; *Erznoznick*, 422 U.S. at 210. A government decision of this kind creates the risk that government officials' own disagreement with the speech, or their desire to suppress the message that it conveys, influenced their decision. See, *e.g.*, *Hustler Magazine*, 485 U.S. at 55; *Cohen*, 403 U.S. at 21.

By contrast, a measure like paragraph 1(c) does not rest on any assessment by government officials of the value of speech with a certain content. Paragraph 1(c) reflects only a determination that allowing demonstrators to insist on confronting their targets face-to-face, when a targeted individual specifically objects, creates an impermissible danger of intimidation and harassment. That determination—amply supported by the record in this case—does not present the danger that government officials' evaluation of the speech will impermissibly affect their decision. The individual targets, not the government, undertake the evaluation.

Paragraph 1(c) also rests on the judgment that individuals seeking health care should be allowed a small degree of breathing room so that they might distance themselves slightly from highly intrusive behavior. See *Madsen*, 114 S. Ct. at 2528, quoting *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 783-84 n.12 (1979); cf. *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978). The government should not ordinarily be in the business of deciding which speech is too offensive or objectionable. But it does no such thing when, as here, it merely makes it possible for certain especially vulnerable classes of people to have a minimal chance to avoid what they find to be highly intrusive conduct by speakers.

C. Finally, petitioners rely (Pet. Br. 34-38) on a portion of *Madsen* that invalidated a provision of the injunction at issue there. That provision of the *Madsen* injunction forbade persons from "physically approaching any

person seeking services of the clinic 'unless such person indicates a desire to communicate' in an area within 300 feet of the clinic." 114 S. Ct. at 2529. There are, however, many differences between the provision invalidated in *Madsen* and paragraph 1(c). The *Madsen* injunction extended 300 feet from the clinic. See 114 S. Ct. at 2529. The injunction in this case permits petitioners to approach as close as fifteen feet from the entrances to clinic buildings and parking lots. See Pet. App. A-34. In addition, the terms of the *Madsen* injunction were significantly more vague than those of paragraph 1(c). For example, the *Madsen* injunction, instead of specifying precise distances, prohibited the defendants from "physically approaching" persons seeking access to the health care facilities. 114 S. Ct. at 2529.

Perhaps most important, the injunction in *Madsen* forbade communication altogether with any person who did not consent in advance. Paragraph 1(c) does not do this; instead, it places the burden on the targets of petitioners' activities to indicate their desire that petitioners move away. Paragraph 1(c), unlike the *Madsen* injunction, has no application at all until the targets of petitioners' activities so indicate. Petitioners belittle this distinction (see Pet. Br. 36-37), but the Court's decisions do not; indeed they have emphasized its importance. The contrast between *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), and *Rowan v. United States Post Office*, *supra*, illustrates this point. Both cases involved statutes that had the effect of forbidding certain mailings unless the addressee assented. In *Bolger* the mailings were commercial advertisements, which are, of course, lower-value speech. See 463 U.S. at 65-68. The statute in *Rowan* applied to high-value speech. One would therefore expect the *Bolger* statute to have received a more favorable reception.

But the Court invalidated the statute in *Bolger* and upheld the statute in *Rowan*. The crucial distinction was precisely the difference between the injunction in *Madsen*

and paragraph 1(c). The statute in *Bolger* forbade the mailings unless the recipient consented, while in *Rowan* the mailings could continue until the recipient affirmatively objected. *Bolger* distinguished *Rowan* precisely on this ground: *Rowan*, the Court noted, involved "addressees [who had] give[n] notice to a mailer that they wish[ed] no further mailings" (463 U.S. at 72). The same distinction—between unsolicited approaches and approaches that have been specifically rebuffed—distinguishes this case from the portion of *Madsen* on which petitioners rely.

D. For all of these reasons, a measure that requires demonstrators to withdraw from close contact with an individual who so requests is not problematic under the First Amendment. It does not follow, of course, that paragraph 1(c) is necessarily constitutional; under *Madsen*, respondents must show the requisite connection between petitioners' conduct and the injunction.

The record in this case, however, seems to leave little doubt that a remedy like paragraph 1(c) is appropriate. The so-called "counselors" named in the injunction have a history of "harassing, badgering, intimidating and yelling at * * * patients" (Pet. App. A-10), even after the patients ask to be left alone. Indeed, some of these "counselors" have been convicted of harassing behavior but have continued to engage in the same practices. *Id.* at A-11. In these circumstances the district court was surely justified in concluding—as the court of appeals ruled, by a lopsided majority—that petitioners' future "counseling" activities would present a serious risk of the kind of harassing and intimidating conduct that the First Amendment unquestionably does not protect.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

DAVID A. STRAUSS
Special Assistant City Attorney
1111 East 60th Street
Chicago, IL 60637
(312) 702-9601

RODERICK G. MCDOUGALL *
City Attorney

MARVIN A. SONDAG
Assistant City Attorney

200 West Washington Street
Phoenix, AZ 85003
(602) 262-4557
* *Counsel of Record*

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